

Mahadeva a/p Krisanon v Teja Singh (practised as advocate and solicitor under the name and style of Messrs Teja Singh Penesar & Co)

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HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–396 OF 2003
CHEW SOO HO JC
29 APRIL 2010

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Evidence — Burden of proof — Person who alleged fact had to prove it — Conflicting versions of whether plaintiff had failed to instruct defendant properly — Determine probability and plausibility of oral evidence — Approach to be used — Evidence Act 1950 s 101

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Tort — Negligence — Duty of care — Breach — Whether defendant solicitor in breach of duty of care when he failed to file plaintiff's claim in court within six year limitation period — Whether defendant had discharged himself within limitation period and therefore not liable to plaintiff

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On 11 October 1997, the defendant solicitor was appointed by the plaintiff to act for him in a claim for damages arising out of a traffic accident that occurred on 10 September 1996, wherein the plaintiff had allegedly suffered severe injuries and permanent disablement. According to the plaintiff he had given a detailed statement of the accident to the defendant and the latter had written to the General Hospital to obtain a report on the extent of the plaintiff's injuries. The plaintiff alleged that the defendant had thereafter failed to file the claim in court within the six year limitation period, ie on or before 9 September 2002. The plaintiff therefore commenced an action in negligence against the defendant for his failure to file the plaintiff's claim for damages arising out of the said accident within the six year limitation period and thereby causing the plaintiff to suffer losses and damages. The plaintiff claimed general damages, special damages quantified at RM1,002,700, punitive and exemplary damages, interest and costs against the defendant. In his defence the defendant averred that the version of the accident pleaded by the plaintiff in his claim differed materially from the instructions given to him when he was appointed by the plaintiff on 11 October 1997. It was the defendant's case that since there was no response from the plaintiff for further instructions, though having been repeatedly requested via numerous letters to call at his office, the defendant had no choice but to discharge himself from further acting for the plaintiff, which he did by way of his firm's letter dated 26 February 1999. To support his case the defendant produced five letters written to the plaintiff, as between 1997–1999, requesting him to call at the defendant's office or to supply the

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- A requisite documents, namely, the police report number, insurance policy, copy of the road tax of his motorcycle, registration card, repair bills, medical bills, medical leave and details of employment. During the course of the trial the plaintiff admitted in evidence that he had appointed the defendant after his first solicitors, Messrs Haniff & Chew ('the first solicitor') had closed his file.
- B The sole issue for determination in this case was whether the defendant had discharged himself within the limitation period and was therefore not liable to the plaintiff.

Held, dismissing the claim with costs:

- C (1) Under s 101 of the Evidence Act 1950 he who asserts must prove the fact that he asserted. Thus the plaintiff bears the burden to prove his case. However, although the plaintiff asserted that he had gone to the defendant's office with one Ravi and handed over all the requisite documents to the defendant there was no corroboration to the plaintiff's evidence. It was for the plaintiff to call upon the said 'Ravi' to prove his assertion and not the defendant. In fact, the plaintiff's evidence is wholly inconsistent and contradictory to his own evidence that he had given the defendant all the documents requested by the defendant. From the evidence it was more probable that the plaintiff had not given any documents to the defendant except for an outpatient card (see paras 8 & 10).
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- F (2) When the defendant produced the five letters written to the plaintiff to call at his office or to supply the requisite documents, these letters established the fact that the defendant had attempted to contact the plaintiff and the onus of proof then shifted to the plaintiff to rebut the evidence. The plaintiff admitted receiving two of those letters but denied receiving the later three including the letter dated 26 February 1999 wherein the defendant had discharged himself from further acting for the plaintiff. From the evidence, the mere assertion of denial without more by the plaintiff in the light of all the documentary evidence adduced by the defendant could not be sufficient evidence to satisfy his onus of proof. Although the defendant was not able to produce a register of posting of documents, in the absence of any contrary evidence or challenge, the defendant's explanation was accepted (see paras 7–9).
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- I (3) The evidence of the plaintiff's first solicitors was relevant to show that the plaintiff had similarly failed to give further instructions to them resulting in the first solicitors also having to give notice to discharge themselves, which was similar to the defendant's position (see para 10).
- (4) From the evidence as a whole it was implausible and highly improbable that the defendant would not proceed with the matter if the plaintiff had provided all the relevant documents. It would be more likely that the plaintiff had failed to provide the police report number or any of the

required information and therefore the defendant could not act any further for him and therefore discharged himself. On a balance of probabilities the defendant's version of events is more probable and the defendant had with valid reasons discharged himself from acting for the plaintiff. Since the defendant had discharged himself well before the expiry of the limitation period for good and valid reasons, the issue of negligence can neither arise nor be attributed to him (see paras 11–13).

- (5) In the instant case, the plaintiff had failed to prove his injuries by not producing any evidence to prove the special and general damages he had pleaded (see para 20).

[Bahasa Malaysia summary]

Pada 11 Oktober 1997, defendan peguam telah dilantik oleh plaintiff untuk bertindak bagi pihaknya dalam satu tuntutan ganti rugi yang timbul daripada kemalangan jalan raya yang berlaku pada 10 September 1996, di mana plaintiff telah dikatakan mengalami kecederaan parah dan kehilangan upaya kekal. Menurut plaintiff dia telah memberikan kenyataan terperinci tentang kemalangan itu kepada defendan dan defendan telah menulis kepada Hospital Besar untuk mendapatkan laporan tentang tahap kecederaan plaintiff. Plaintiff mendakwa defendan berikutan itu telah gagal memfailkan tuntutan itu di mahkamah dalam tempoh had masa enam tahun, iaitu pada atau sebelum 9 September 2002. Plaintiff dengan itu telah memulakan tindakan untuk kecuai terhadap defendan kerana kegagalannya memfailkan tuntutan plaintiff untuk ganti rugi yang timbul daripada kemalangan tersebut dalam tempoh had masa enam tahun dan oleh demikian menyebabkan plaintiff mengalami kehilangan dan kerugian. Plaintiff telah menuntut ganti rugi am, ganti rugi khas berjumlah RM1,002,700, ganti rugi punitif dan tauladan, faedah dan kos terhadap defendan. Dalam pembelaannya defendan telah menegaskan bahawa versi kemalangan yang dipohon oleh plaintiff dalam tuntutannya berbeza sekali dengan arahan yang telah diberikan kepadanya apabila dia dilantik oleh plaintiff pada 11 Oktober 1997. Adalah kes defendan bahawa memandangkan tiada jawapan daripada plaintiff untuk arahan selanjutnya, meskipun telah berulang kali meminta melalui beberapa surat untuk memanggil di pejabatnya, defendan tiada pilihan tetapi untuk menamatkan perkhidmatannya daripada terus bertindak bagi pihak plaintiff, yang mana telah dilakukannya melalui surat firmannya bertarikh 26 Februari 1999. Bagi menyokong kesnya defendan telah mengemukakan lima surat yang ditulis kepada plaintiff, antara tahun 1997 hingga tahun 1999, memintanya memanggil pejabat defendan atau memberikan dokumen-dokumen yang diperlukan, iaitu, nombor laporan polis, polisi insurans, salinan cukai jalan motosikalnya, kad pendaftaran, bil pembaikan, bil perubatan, cuti sakit dan butiran pekerjaan. Sepanjang perjalanan perbicaraan plaintiff mengakui dalam keterangan bahawa dia telah melantik defendan selepas peguam pertamanya, Tetuan Haniff & Chew ('peguam pertama') telah menutup failnya. Isu utama

A untuk ditentukan dalam kes ini sama ada defendan telah menamatkan perkhidmatannya dalam tempoh had masa dan adalah dengan itu tidak bertanggungjawab kepada plaintif.

Diputuskan, menolak tuntutan dengan kos:

- B (1) Di bawah s 101 Akta Keterangan 1950 sesiapa yang menegaskan
hendaklah membuktikan fakta yang ditegaskannya. Oleh itu plaintif
mempunyai beban untuk membuktikan kesnya. Namun begitu,
meskipun plaintif menegaskan bahawa dia telah pergi ke pejabat
C defendan dengan seorang bernama Ravi dan menyerahkan semua
dokumen-dokumen yang diperlukan kepada defendan tiada sokongan
terhadap keterangan plaintif itu. Adalah untuk plaintif memanggil 'Ravi'
tersebut untuk membuktikan penegasannya dan bukan defendan.
D Bahkan, keterangan plaintif secara keseluruhan tidak konsisten dan
bercanggah dengan keterangannya sendiri bahawa dia telah memberikan
defendan semua dokumen yang dikehendaki oleh defendan. Berdasarkan
keterangan ia lebih berkemungkinan bahawa plaintif tidak memberikan
apa-apa dokumen kepada defendan kecuali kad pesakit luar (lihat
perenggan 8 & 10).
- E (2) Apabila defendan mengemukakan lima pucuk surat yang ditulis kepada
plaintif untuk memanggil pejabatnya atau memberikan
dokumen-dokumen yang diperlukan, surat-surat tersebut telah
membuktikan fakta bahawa defendan telah cuba menghubungi plaintif
dan beban bukti kemudian berpindah kepada plaintif untuk
F mematahkan keterangan itu. Plaintif mengakui telah menerima dua
daripada surat tersebut tetapi menafikan menerima tiga yang seterusnya
termasuklah surat bertarikh 26 Februari 1999 di mana defendan telah
menamatkan perkhidmatannya daripada terus bertindak untuk plaintif.
Berdasarkan keterangan, penegasan terhadap penafian semata-mata dan
G tidak lebih daripada itu oleh plaintif berdasarkan semua keterangan
dokumentar yang dikemukakan oleh defendan tidak merupakan
keterangan yang mencukupi untuk meyakinkan beban buktinya.
Meskipun defendan tidak dapat mengemukakan daftar pengeposan
dokumen-dokumen, dengan ketiadaan apa-apa keterangan atau cabaran
H bertentangan, penjelasan defendan diterima (lihat perenggan 7–9).
- I (3) Keterangan peguam pertama plaintif adalah relevan untuk menunjukkan
bahawa plaintif juga telah gagal memberikan arahan selanjutnya kepada
mereka sehingga menyebabkan peguam pertama juga memberikan notis
untuk melepaskan diri mereka, yang sama dalam kedudukan defendan
(lihat perenggan 10).
- (4) Berdasarkan keterangan secara keseluruhan ia tidak dapat dipercayai dan
besar kemungkinan bahawa defendan tidak akan meneruskan perkara
tersebut jika plaintif telah mengemukakan semua dokumen relevan. Ia

lebih berkemungkinan bahawa plaintif telah gagal memberikan nombor laporan polis atau apa-apa maklumat yang dikehendaki dan dengan itu defendan tidak boleh bertindak selanjutnya untuknya dan oleh demikian telah menamatkan perkhidmatannya. Atas imbalan kebarangkalian versi kejadian defendan lebih berkemungkinan dan defendan mempunyai sebab-sebab sah menamatkan perkhidmatannya daripada bertindak untuk plaintif. Memandangkan defendan telah menamatkan perkhidmatannya sebelum tamat tempoh had masa untuk sebab-sebab yang jelas dan sah, isu kecuaiian tidak boleh timbul atau dianggap berpunca daripadanya (lihat perenggan 11–13).

- (5) Dalam kes ini, plaintif telah gagal membuktikan kecederaannya kerana tidak mengemukakan apa-apa keterangan untuk membuktikan ganti rugi khas dan am yang dipohonnya (lihat perenggan 20).]

Notes

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 963–1011.

For cases on person who alleged fact had to prove it, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 591–594

Cases referred to

Fletcher & Son v Jubb Booth & Helliwell [1920] 1 KB 275, CA (refd)

International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86, FC (refd)

Jacks v Bell (1828) 3 C & P 316 (refd)

Teh Lee Tong v Rex [1956] MLJ 194 (refd)

Legislation referred to

Evidence Act 1950 ss 15, 101, 114(g)

Darshan Singh (Darshan Singh) for the plaintiff.

Raam Kumar (KB Tan Kumar & Partners) for the defendant.

Chew Soo Ho JC:

BRIEF FACTS

[1] The plaintiff pleaded that he was involved in a traffic accident on 10 September 1996 at about 4.30am while riding motorcycle No PCV 1125 at Jalan Mount Erskine, Penang towards the direction of Jalan Burma after the junction of Jalan Gottlieb/Jalan Mount Erskine/Jalan Burma, Penang where he was collided into by motorcycle No PCX 5434 from behind. As a result of this accident, the plaintiff suffered severe injuries and permanent disablement. The defendant was retained by the plaintiff on 11 January 1997 to act for the plaintiff to claim damages arising out of the aforesaid accident. The plaintiff

- A alleged that he had given detailed statement of the accident to the defendant and the defendant had written to the General Hospital, Traffic Police and Road Transport Department for all relevant reports and documents; thereafter, the defendant had also sent a notice of action to the People's Insurance Co (M) Bhd being the insurer of the motorcycle PCX 5434. However, the plaintiff alleged
- B that the defendant had failed to file the claim in court within the six years limitation from 10 September 1996 ie on or before 9 September 2002. On account of the defendant's negligence or his breach of contract or duty of care, the plaintiff has suffered losses and damages. Hence he claimed general damages, special damages quantified at RM1,002,700, punitive and exemplary
- C damages, interest and costs.

- [2] The defendant's defence is that the version of event of the accident pleaded by the plaintiff differed materially from the instruction given to him in that the accident occurred on 9 September 1996 at about 3am at the junction of Jalan Gottlieb/Jalan Burma/Jalan Mount Erskine when the plaintiff proceeded on after the traffic light had turned green, a car had suddenly crossed its path from Jalan Mount Erskine resulting in the plaintiff having to brake abruptly which then resulted in his motorcycle being collided into from behind by motorcycle No PCX 5434. The defendant averred that when he was appointed on 10 November 1997, it was one year two months after the accident. No police report or its number or any other documents except an out-patient card, were given by the plaintiff. Numerous letters had been sent to the plaintiff calling him to come to the defendant's office for instruction but the plaintiff had never showed up. The defendant was unable to act further and had
- D no choice but to discharge himself vide his letter dated 26 February 1999. Such discharge was three years before the limitation had set in. It was more than four years after the defendant had discharged from acting for the plaintiff that the plaintiff lodged a police report of the alleged accident and sued the defendant.
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G THE ISSUES

- [3] The plaintiff's solicitor Mr Darshan Singh in his written submission submitted that there is only one issue which is whether the plaintiff had discharged the defendant and whether the defendant's retainer terminated before the six years limitation.
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[4] The defendant's solicitor Mr Raam Kumar, on the other hand, raised three issues as follows:

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- (a) Has the plaintiff shown any evidence that the alleged accident on 10 September 1996 is genuine?;
 - (b) Has the plaintiff given any documents to the defendant to allow him to act for the plaintiff?; and

- (c) Has the burden shifted to the defendant to rebut the plaintiff's alleged negligence?

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[5] The plaintiff sued the defendant basically for negligence for failure to file his claim for damages arising out of the aforesaid road accident within the six years limitation period. The defendant's case is that as there was no response from the plaintiff for further instructions though having been repeatedly requested to call on his office via numerous letters, the defendant had no choice but to discharge himself from acting for the plaintiff. This was done vide his letter to the plaintiff, exh D13. Hence the main issue is whether the plaintiff had proved his case against the defendant on a balance of probabilities and whether the defendant had duly discharged from acting for the plaintiff and that such discharge was before the expiration of the six years limitation period for filing the plaintiff's claim.

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EVALUATION AND FINDINGS

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[6] Evidence of this case shows that there is no dispute that the defendant was appointed by the plaintiff on 11 October 1997 to act for him in the claim for damages arising out of the alleged traffic accident that occurred on 10 September 1996. It was also admitted by the plaintiff that he had appointed the defendant more than one year after the date of the alleged accident after his first solicitors Messrs Haniff & Chew had closed his file. The plaintiff said that he went with one Ravi to see the defendant and he had given all documents to the defendant. Learned counsel for the plaintiff was attempting to say that Ravi was the defendant's tout when he cross-examined the defendant which the defendant vehemently denied. However, the plaintiff did not call Ravi to testify and there is therefore no evidence as to who this Ravi was and all the most there is no corroboration to the plaintiff's evidence that he had given all documents to the defendant. In cross-examination, the plaintiff also said that he had seen the defendant in the year 2002 with his friend named Sara. He went in Sara's car or on Sara's motorcycle. However, this Sara was not called to lend credence to his evidence. The plaintiff also stated that each time he went to the defendant's office, the defendant only told him to wait and that his case would take a long time. At times when the defendant was not in his office, his sister named 'Goodi' ('DW3') who worked in the defendant's office would inform him to come again. The plaintiff added that at the end of 2002, he met the defendant in the latter's office and was informed that the defendant could not proceed with his case as the defendant had expended money to obtain medical report, police report, JPJ reports etc. In March 2003, the plaintiff saw the defendant again but the defendant did not inform him that he did not file the claim within the limitation period and that the plaintiff's claim was statute-barred. On 16 June 2003 when he went to the defendant's office, the defendant had informed him that his file was closed and that it was the defendant's clerk who

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- A had failed to take note of the six years limitation and had it recorded in the diary. It was alleged that the defendant said he had forgotten. Hence the plaintiff said that the defendant was negligent and had breached his duty of care to the plaintiff.
- B [7] In this respect, the defendant's evidence is emphatic that after the plaintiff had seen and appointed him on 11 October 1997, the plaintiff informed him of the accident which differed from the plaintiff's version as pleaded and as to the documents, the plaintiff only gave him a 'Kad Pesakit Luar' and executed a consent form to apply for his medical report but when
- C asked about the plaintiff's police report, the plaintiff said he would give the report number and would get back to the defendant later. However, the plaintiff had never done so despite the the defendant's repeated letters to him dated 11 October 1997 ('D19'), 6 February 1998 ('D10'), 4 March 1998 ('D11'), 12 August 1998 ('D12') and the last letter 26 February 1999 ('D13'),
- D to call at the defendant's office or to supply the requisite documents. The defendant explained that during the material time, the police would not entertain any application or request for documents without at least the police report number. He could not proceed to write to the police without the report
- E number. In the last letter D13, the defendant had expressly informed the plaintiff that the plaintiff had failed to come to the defendant's office for further instruction and on account of that, the defendant was unable to proceed further with the plaintiff's claim and notice was given to the plaintiff that should the plaintiff fail to show up within 14 days from the date of the letter ie
- F from 26 February 1999, the defendant would close the plaintiff's file. Since the plaintiff did not call at the defendant's office upon the final notice vide D13, the defendant asserted that he had discharged himself from acting for the plaintiff. At the time of his discharge, there were three more years before the expiry of the six years limitation which was due on 9 September 2002.
- G [8] From the evidence of both the plaintiff ('PW1') and the defendant ('DW1'), they are apparent conflicting versions with the plaintiff saying he had been to the defendant's office on various occasions to inquire about his claim whereas the defendant is emphatic that the plaintiff had never responded to his
- H requests to come forward for instruction; consequently, he had no alternative but to discharge himself. Faced with such situation, it is upon this court to find which of the versions of the parties to be more probable on a balance of probabilities. Evidence of the defendant is supported by all the letters D19, D10–D13 that he had sent to the plaintiff. The plaintiff's evidence was,
- I however, assertions which are unsubstantiated. He alleged he had attended the defendant's office on various occasions but this court is unable to find any evidence from him as to when he had attended as no dates were given by the plaintiff prior to the defendant's discharge from acting for him. He claimed he had gone with Ravi or Sara but both Ravi and Sara were not called to testify.

Learned counsel for the plaintiff submitted that Ravi was the contact man as his telephone number was given to the defendant since the plaintiff had no telephone and the defendant should have called him and not the plaintiff. The defendant explained that they had contacted Ravi to inform the plaintiff to come for further instruction but the plaintiff did not show up. In this respect, it must be borne in mind that the plaintiff bears the burden to prove his case. He who asserts must prove the fact that he asserted; see s 101 of the Evidence Act 1950. It was the plaintiff who asserted that he had gone to the defendant's office with the said Ravi and Ravi witnessed that he had handed documents to the defendant. The plaintiff must prove that fact by calling Ravi and not the defendant; see *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 (FC) (infra). The defendant had exhibited five letters D19, D10–D13 which the plaintiff had not objected to and in fact D19 was enclosed in the plaintiff's own bundle of documents marked 'B' and the plaintiff had also admitted in examination-in-chief that he did receive D10 and D11 though he denied receiving D12 and D13. All these letters established a fact that the plaintiff was called to come to the defendant's office for instruction or to produce the relevant documents or information requested for but the plaintiff had not responded. In the light of these exhibits, there is an onus on the plaintiff to rebut them since this onus of proof shifted to him and it is incumbent upon him to adduce sufficient evidence on this onus to rebut the defendant's evidence and the exhibits tendered. In *International Times & Ors v Leong Ho Yuen*, His Lordship Salleh Abas FJ (as he then was) in delivering the decision of the Federal Court had succinctly explained the distinction between burden of proof and onus of proof in the following:

For the purpose of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co v Jatashankar Dossa & Ors* and *Raghavama v Chenchamma*). The first sense signified by the expression burden of proof such as referred to in s 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander* (7th Ed) paras 351 and 354). The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to ss 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail.

[9] From the evidence, the mere assertion and denial without more by the plaintiff in the light of all the documentary evidence adduced by the defendant, cannot be said to be sufficient evidence to satisfy his onus of proof and he must

- A be construed to have failed to rebut the documentary evidence which showed explicitly that he had been repeatedly requested to call on the defendant's office but had declined to respond resulting in the defendant discharging himself as he could not proceed with plaintiff's claim any further. Although the defendant had no documentary proof of the posting of the aforesaid letters D19, D10–D13, he had given explanation that his register of posting of documents kept by his office was destroyed along with other documents when his office was hit by a storm. In the absence of any contrary evidence nor challenge, this court accepts the defendant's explanation. Learned counsel for the plaintiff had contended that the defendant should have called his former clerk named Nor Azizah bt Saad who handled the whole claim. These letters D19, D10–D13 were physically prepared by the said Nor Azizah as her initial 'n' or 'N' appeared thereon. That may be so but the fact that these letters were prepared by her is not in dispute. Even if she is called, she cannot deny the fact that she had prepared them. In that respect, it may not be necessary to call her. A witness who in the opinion of a party is unnecessary or is obviously hostile is not bound to be called as a witness; see *Teh Lee Tong v Rex* [1956] 22 MLJ 194. Section 114(g) of the Evidence Act 1950 will only be invoked if there is wrongful withholding or suppression of a material witness or material evidence and not on account a mere non-calling of a witness. Be that as it may, the plaintiff's evidence is that he met 'Goodi', the defendant's clerk who was called as DW3; he had never said he met Nor Azizah at all. The important fact is that the plaintiff had admitted that he had received D19 which is in his own bundle of documents B and admitted in his own examination-in-chief the receipt of the two defendant's letters exhs D10 and D11 though they were unsigned. The defendant had explained that it is his practice that he does not sign the copies for his own office. By admitting receipt of D10 and D11 and without any challenge as to the said unsigned copies, the plaintiff must be taken to have accepted that he had received the original of D10 and D11 duly signed as stated by the defendant as can be seen in D19 which the plaintiff had received and which was duly signed by the defendant. As to the plaintiff's denial in cross-examination that he had received D12 and D13, I find these letters carried the same address of the plaintiff as in the other two letters D10 and D11 which the plaintiff admitted to have received. The plaintiff gave the reason that if he had received he would have attended the defendant's office. However, there is no evidence from the plaintiff to show that after he had received the two earlier letters D10 and D11 from the defendant that he responded and attended the defendant's office. He did not even call Sara whom he alleged that he was taken to the defendant's office in Sara's car or on his motorcycle. His explanation is lame. From the whole cross-examination of the plaintiff, I must say that the plaintiff had initially denied having received all the exhs D19, D11–D13 but changed his denial as to D19 and D11 which he had admitted in his examination-in-chief when being challenged further. As to D10, it was after its contents having been translated that he finally agreed that he had received this letter. It is so obvious that plaintiff himself was unsure of all these

letters to him. This has put his credibility in doubt. His evidence in this respect is reproduced to fortify my observation of the plaintiff's demeanour and my doubt as to his credibility. **A**

Ikatan C m.s. 1 dirujuk

Saya setuju saya ada terima surat ini. **B**

(Selepas kandungan diterjemah kepada saksi).

Saya tidak terima surat di m.s. 2 (D11).

S: Tadi peguam anda ada tanya, kata ada terima; sekarang kata tak terima. Kenapa? **C**

J: Sekarang, saya kata ada terima surat di Ikatan C m.s. 2.

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Ikatan B m.s. 11 dirujuk (D19). **D**

Saya tidak terima surat ini.

S: Kenapa kamu berbohong; tadi bila lawyer anda tanya, kamu kata ada terima surat ini?

J: Sekarang saya kata ada terima surat ini. **E**

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Ikatan C m.s. 1 dirujuk (D10).

Surat ini bertarikh 6.2.1998.

S: Kenapa anda berdiam diri bila terima surat ini jika anda telah memberi dokumen-dokumen tersebut menurut Ikatan B m.s. 11? **F**

J: Saya tidak dapat menjawab soalan ini.

[10] On the requested documents in D19, the plaintiff said he had given all these documents to the defendant. As stated in D19 those documents the defendant requested from the plaintiff are police report number, insurance policy, copy of road tax of his motorcycle, registration card, repair bills, medical bills, medical leave, his identify card and details of employment and employer. However, the plaintiff said in cross-examination he could not remember the police report number; he did not know about the insurance policy or road tax; on one breath, he said the motorcycle belonged to him and changed immediately on the next breath that it belonged to his friend and finally changed again to say it belonged to his colleague; he said the registration card was kept in a motor shop but he did know the name of the shop; he agreed he had no repair bill; he did not give the EPF and SOCSO details to the defendant but only the medical bills and his medical leave. This evidence is wholly inconsistent and contradictory to his own evidence that he had given all those documents requested by the defendant vide D19 to the defendant when he **G**
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- A himself either did not know those details or did not have them. His credibility is again questionable. Nevertheless it is consistent and more probable with the defendant's evidence that the plaintiff had not given him any document except a patient's card. From the evidence I am inclined to hold that the plaintiff had failed to supply the requisite documents and information or instruction to the
- B defendant despite having received the defendant's letters which this court finds to include also D12 and D13 when the plaintiff admitted having received all the other letters from the defendant. The defendant had called DW2 from Messrs Hanif & Chew, the former solicitor retained by the plaintiff to pursue the same claim for damages arising from the same accident. DW2 testified that
- C the plaintiff saw him once asking DW2 to act for him but thereafter, the plaintiff had never come back to give him further instructions and because of that, he had sent the plaintiff a final notice on 9 April 1998 and proceeded to close his file. Evidence of DW2 is indeed relevant to show that the plaintiff had similarly failed to give further instructions to his previous solicitors after the
- D retainer resulting in the previous solicitors having to give notice to discharge themselves which is similar to the defendant's position; see s 15 of the Evidence Act 1950.
- E [11] Learned counsel for the plaintiff submitted that it would be improbable that an injured claimant would not have called on his lawyer's office as he would be anxious to get his compensation. On this question, I find that it equally applies to a solicitor who would also be anxious to file the claim the soonest possible if he is able to do so as it would similarly be to his advantage and interest. The simple question to ask is 'Will a solicitor simply relinquish an
- F accident claim when he is able to proceed with the claim?' The answer is obviously in the negative. The defendant had taken action to write to the JPJ, the hospital, the insurance company and had even drafted the statement of claim (P30); he was only waiting for all relevant particulars to be acquired to fill
- G in the blanks. This court finds it implausible and highly improbable that he would not proceed with the claim except for reason that the plaintiff had not come forward to give further instruction and/or to coordinate the defendant's necessary action such as to accompany him to sign a fresh consent in the hospital as required by the Hospital's Record Office for his medical report or to
- H advise plaintiff to lodge a fresh police report if he had not lodged one. Both Mr Teja Singh, the defendant and En Mohamed Haniff bin Ahmed Shariff, the plaintiff's previous solicitor, said the same reason that the plaintiff had not showed up and had not given them further instruction and for that, they gave final notice to the plaintiff and subsequently closed their respective files. I find
- I no reason to doubt their evidence.

[12] The defendant had discharged from acting for the plaintiff 14 days from his final notice dated 26 February 1999 (D13) and DW2 discharged himself on 9 April 1998 (D8). The expiry of the limitation of six years was on 9 September

2002. Vividly, both the defendant and DW2 had discharged from acting for the plaintiff long before the expiry of the limitation period. If a client is not interested in his own claim, I do not see how his lawyer could proceed with the matter. The situation would certainly be different if all relevant and requisite materials were supplied to the lawyer which enabled him to prepare and file the case in court and yet the lawyer failed to do so. This is not the case here. The defendant had explained that during the material time, the police department will not entertain any application for documents if there was no report number being forwarded as it was not computerised at the material time. The plaintiff had failed to supply the defendant with the report number. The defendant, therefore could not act further. According to the defendant, the police report of the accident and relevant documents of investigation would be necessary to determine liability in the claim. As regards to the plaintiff's medical report, the defendant had written to the Record Office of the General Hospital, Penang for the said medical report vide his letters D14, D15 and D16. Vide its letter dated 8 February 1999 (D17) the Penang Hospital had replied to the defendant's last reminder letter, D16, requesting the plaintiff to call at the Record Office of the Hospital to sign anew as his consent letter given earlier was found to be doubtful. The defendant then wrote to the plaintiff vide D13 dated 26 February 1999 requesting the plaintiff to attend his office so that they could do the needful to bring the plaintiff to the hospital. In this same letter, the plaintiff was also given the 14 days notice that his file would be closed if he did not show up but the plaintiff apparently declined to turn up. The defendant explained that he required the medical report to plead the injuries in the claim and to quantify the damages from the injuries in the medical report. Hence without the police report number to obtain all relevant documents from the police and without the plaintiff's medical report, the defendant expressed that he would not be able to determine the liability and the quantum. Consequently he would not be able to proceed to file the claim in court although he had put up a draft. This court can sense the frustration in the defendant when the plaintiff failed to turn up for 1 1/4 years after retainer. Learned counsel for the plaintiff contended that the defendant could have advised the plaintiff to lodge a fresh police report and to proceed with the claim as injuries could be obtained from the plaintiff without having to wait for the medical report. He referred to *Solicitors' Duties And Liabilities* by Roger Billins 1999 pp 147–152 that '(1) It is the duty of a solicitor when consulted by a client concerning a contentious matter to undertake a proper investigation of the cause so that he and counsel (if instructed) can advise whether there is a claim or sustainable defence (2) If the solicitor is of the opinion that there is no cause of action or good defence then it is his duty to advise the client accordingly and to ensure that he has understood it *Jacks v Bell* (1828) 3 C & P 316. However, all these could only be done if the plaintiff had called on the defendant's office as requested vide his letters and gave further and proper instructions. In cases where the clients are not prepared to cooperate, action of the solicitor would certainly be curtailed. All the most if the client simply declines to show up in his solicitor's office,

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A there is nothing more that the solicitor could do apart from writing to the client and ultimately to discharge himself from acting when the client fails to respond at all. This approach or practice was apparently also taken by Messrs Hanif & Chew.

B [13] Undoubtedly, it is negligence of a solicitor if he fails to comply with crucial time limits or if he delays proceedings so that his client's claim becomes statute-barred; see *Fletcher & Son v Jubbs Booth & Helliwell* [1920] 1 KB 275 (CA). However, if he has discharged himself well before the expiry of the limitation period for good and valid reasons, the issue of negligence can no longer arise nor can negligence be attributed to him.

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D [14] Reverting to the evidence during cross-examination of the plaintiff and his credibility, in addition to what had been recapitulated above, I must say that there are multiple material inconsistencies and contradictions as well as the demeanor of evasiveness in answering the questions, all of which give rise to a grave doubt as to the plaintiff's credibility as a truthful witness. The plaintiff said that when he was at Penang Hospital after the accident, he had lodged a police report. This police report was not produced in court and when he was

E challenged to bring a copy of the said report, he said:

S: Boleh anda membawa salinan Polis kemudian hari?

J: Saya tidak mampu untuk membawa laporan polis tersebut.

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G [15] The defendant challenged that there was no police report lodged by the plaintiff in the hospital and referred the charges as contained in defendant's own bundle of documents: Bundle C pp 89–90, of driving without a valid licence on 10 September 1996 at about 4.30am and for late lodgment of a police report, the plaintiff said he could not remember whether he had pleaded guilty and paid the fine for those charges and in fact could not remember those charges nor could he remember what transpired in court. On the next breath, he agreed he did not have a valid driving licence and had lodged the police report of this accident late. He agreed he lodged the police report about seven

H years after the accident and it was Mr Darshan Singh, his present counsel who instructed him to lodge this report. When he was challenged further on his evidence of his report lodged while he was in hospital, he gave the following answer:

I S: Jika anda kata telah membuat laporan Polis semasa di Hospital, mengapa kamu mengaku salah atas kesalahan gagal melaporkan kemalangan dalam tempoh 24 jam menurut Ikatan B m.s. 90?

J: Saya tidak tahu menjawab soalan ini.

[16] I find that it is improbable that the plaintiff had lodged a police report in hospital as he had alleged. If he did, and if there was one, there is no reason for his present solicitor to have instructed him to lodge a fresh report seven years later.

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[17] The plaintiff said the rider who collided into him is his cousin (PW2). Similarly, the plaintiff agreed that PW2 also lodged a police report about seven years later and three days after he/the plaintiff had lodged his police report. The plaintiff agreed that there were no sketch plan, photographs showing the scene of the accident and damages to the motorcycles etc from the police nor the outcome of the police investigation. As to how the accident occurred, the plaintiff said the accident happened while he was on his way home and had not reached his house. However, PW2, who allegedly rode the other motorcycle which collided with the plaintiff said the accident occurred after the plaintiff had returned home and went out again. It appears that they lived in the same house. This glaring contradiction was not explained. Digressing to the evidence of PW2, PW2 explained that he did not lodge a police report soon after the accident as he thought the matter could be resolved within the family since he did not have a driving licence. He said after the accident he had been paying the plaintiff but could not afford to do so and that was when he was asked to lodge the report. He did so because at the time of lodging the report, he had a driving licence.

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[18] I find this evidence to be highly improbable. In the first place, if PW2's motorcycle was insured, the insurance company would have to bear the injuries claim of the plaintiff. Secondly it was never pleaded that PW2 was the rider of the motorcycle who collided with the plaintiff nor the fact that PW2 had since been paying damages to the plaintiff. The plaintiff did not say in his evidence that PW2 had been paying him damages after the accident. Thirdly, the collision according to PW2 was severe impact due to great speed, yet PW2 sustained minor injuries with no medical evidence. There is also no repair bills to his motorcycle. Lastly, PW2's evidence contradicted the plaintiff's evidence as stated above which was unexplained. Hence, I find no reason to attach weight to PW2's evidence.

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[19] The plaintiff also claimed that he could not walk and has to be wheel-chair bound (he came to court on a wheel chair) but when being referred to his medical specialist report (bundle B pp 99–101) in cross-examination where the plaintiff was seen by consultant orthopedic surgeon on 15 August 2003 which is also about seven years after the accident, he changed to say that he could walk with 'tongkat' but disagreed with the specialist's finding which said that he could walk with full weight bearing. Nevertheless, the plaintiff agreed that after the said accident, he had worked with four companies namely Twenty Leith Street Sdn Bhd, MJ Reject Shop, SMCI Globetronics

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- A Technology and Len Hoe Electrical Engineering. He could not walk but yet he could work. The doubt is obvious. One other fact disclosed in his cross-examination is that the plaintiff was involved in another accident on 8 November 1999. Though the defendant's solicitor had written to the plaintiff's solicitors requesting the plaintiff to be present at the Gleneagles Medical
- B Centre for a second medical opinion on the plaintiff's medical condition, the plaintiff failed to attend giving reason that he had no money and there was no one to bring him; exhs D2 and D3 are referred. I find this to be another unreasonable excuse. The plaintiff could have obtained the assistance if he wanted to and had made an effort to do so. His failure to be examined by
- C another medical specialist on invitation by learned counsel for the defendant has given rise to a doubt as to whether the plaintiff's medical condition was as a result of or perhaps aggravated by his second accident on 8 November 1999 and was not due to the accident on 10 September 1996 or otherwise. The
- D plaintiff's case, as a whole, is full of doubts and uncertainties and there is no attempt to erase them.

- [20] As to damages that the plaintiff had pleaded, I must agree with the submission of learned counsel for the defendant that there is absolutely no
- E evidence to prove the special and general damages. The plaintiff himself admitted he has no evidence to prove the special damages and the medical reports as enclosed in the plaintiff's bundle B were not proved and produced as exhibits nor did the plaintiff call any of the doctors to testify as to his medical conditions. Learned counsel for the plaintiff submitted that the general
- F damages need not be proved but are to be assumed. I find it to be a misnomer for learned counsel to say damages can be assumed. I presume what learned counsel for the plaintiff was trying to say is that general damages are to be quantified from the injuries that the plaintiff had sustained. For the purpose of quantification of general damages, the basic requisite element is the proof or
- G evidence of injuries. In the instant case, the plaintiff had failed to prove his injuries which he could have done so by proving the medical reports but failed to do so. The production of plaintiff's photographs showing his scars or injuries does not suffice to prove the kinds of injuries that he had sustained for the purpose of assessment of quantum. The injuries cannot be simply assumed.

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- [21] On the evidence as a whole and on a balance of probabilities, I find, upon findings of fact, that the plaintiff had failed to prove the negligence alleged against the defendant and the damages that he had pleaded. I also find on a balance of probabilities that the defendant's version is more probable and
- I that the defendant had with valid reasons discharged himself from acting for the plaintiff when the plaintiff failed to respond to his letters requesting for information and documents and/or his presence or attendance at the defendant's office for further instruction; such discharge was well within the limitation period. The plaintiff's denial that he did not receive the defendant's

letters D12 and D13 is rejected as this court finds that he is not a credible witness and his mere denial is no defence. Hence when the plaintiff finally saw the defendant at the end of 2002, March 2003 and on 16 June 2003, the defendant was no longer acting for the plaintiff having discharged himself three years before the limitation period. There is therefore no breach of contract or breach of duty of care.

[22] For the foregoing reasons, the plaintiff's claim is therefore dismissed with costs of RM15,000.

Claim dismissed with costs.

Reported by Kohila Nesan

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